FILED
JAN 5 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 515

THE BOSTON METALS COMPANY,
Petitioner,

vs.

COMPANIA DE ASTRAL, S. A.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

NOLAN P. CHIPMAN,
Counsel for Petitioner,
1000 Baltimore Life Bldg.,
Baltimore 1, Md.

GORDON & FEINBLATT,
Of Counsel,
1000 Baltimore Life Bldg.,
Baltimore 1, Md.

December, 1954.

The Daily Record Co., Baltimore 3, Md.

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The Boston Metals Company prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on July 27, 1954.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion of the Judge of the Baltimore City Court (R. 40) is unreported, and is printed in appendix B hereto, *infra* page 49.* The majority opinion of the Maryland Court of Appeals (R. 180-221), and the dissenting

* There were two Memorandum Opinions written below, but one dealt exclusively with the Court's ruling on Respondent's Motion to Quash Summons and Dismiss Suit (R. 10, 19), and is not in issue or material here.

opinion of the Maryland Court of Appeals (R. 222-225) are printed in appendix B hereto, *infra*, at pages 19 and 47, and are reported in 107 A. 2d 357 and 108 A. 2d 372, respectively.

JURISDICTION

Judgment of the Maryland Court of Appeals was entered on July 27, 1954 (R. 180, 246). Rehearing, which was timely applied for, was denied on October 8, 1954 (R. 241, 246). The Jurisdiction of this Court is invoked under 28 U.S.C., section 1257(3), since Petitioner claims that it has been denied a right set up under the statutes of the United States.

QUESTION PRESENTED

Did the erroneous construction by the Court of Appeals of Maryland of a condition imposed by the Maritime Administration upon the transfer foreign of three (3) United States vessels, under the authority granted it by Title 46 U.S.C. Sections 802, 808, 835, and 839, thwart the usual practice and purpose of that Administration in exercising control over the future use and disposition of vessels so transferred?

STATUTE INVOLVED

The statutory provisions involved are sections 802, 808, 835 and 839 of Title 46, U.S.C. ("Shipping Act, 1916". Sept. 7, 1916, c. 451, §44, as added, July 15, 1918, c. 152 §4, 40 Stat. 903). They are printed in Appendix A *infra* pages 13 to 18.

STATEMENT

The Boston Metals Company, Petitioner (hereinafter called Boston), is a Maryland corporation engaged in the sale and scrapping of ships, doing business in Maryland, with its principal office at Baltimore, Maryland. Compania de Astral, S. A. Respondent (hereinafter called Astral), is a Panamanian corporation engaged in the banana shipping

business, not doing business in the United States. At the time of suit, all of the stock in Astral was owned by two individuals who resided in Panama.

Boston owned three surplus Navy frigate class ships which it agreed to sell to Astral. The contracts embodying the agreements of the parties relative to sale and purchase were dated February 18, 1952, and February 19, 1952, respectively (R. 6-10). The contract of February 18, 1954, required Boston to obtain approval of the United States Government for transfer of these ships to the Panamanian flag (R. 7-8). The contract of February 19, 1952 provided that if the Maritime Administration approved the transfers subject to conditions prescribed by it "with respect to future use and disposition of any or all of [the] vessels, such approval will amount to approval of the United States Government . . ." (R. 9-10).

The Maritime Administration approved the transfer of these vessels to Astral subject to the condition, *inter alia*, that

> "(2) For the duration of the National Emergency as proclaimed by the President on December 16, 1950:
>
> (a) there shall be no change in the ownership or registry of said vessels nor shall there be any transfer of stock interest in said corporation to persons not citizens of the United States without the prior approval of the Maritime Administration: . . ." (R. 141-143).

The penalty for default of this condition was that Astral should pay to the Maritime Administration, as liquidated damages and not as a penalty, the sum of $25,000.00 for each vessel involved in the default, said payment to be secured by a surety bond or other surety or form of guarantee satisfactory to the General Counsel of the Maritime Administra-

tion. Astral refused to complete the purchase of the ships, and suit was brought by Boston for breach of the contracts of February 18 and 19, 1953. Astral's Motion to Quash Summons and Dismiss Suit on the ground that it was a non-resident, foreign corporation, not doing business in the State of Maryland was overruled by the trial court (R. 19). The case was then tried on the merits, and the lower court held that the conditions imposed by the Maritime Administration, which Astral relied upon in defense of its refusal to perform, were within the scope of the contracts between the parties, were within the power of the Maritime Administration to impose, and were the "usual and ordinary conditions imposed" on a transfer foreign, Appendix B, *infra*, page 49.

On appeal to the Court of Appeals of Maryland by Astral, the judgment of the trial court was reversed. The Court of Appeals unanimously held that jurisdiction was validly obtained over Astral under the Maryland Corporation law. However, by a 3 to 2 decision it held further that Astral was excused from performance under the contract because the condition prohibiting transfer of stock to persons not citizens of the United States without prior approval of the Maritime Administration was not a condition with respect to future use and disposition of vessels, and that a corporation could not assent to this condition without the concurrence of the stockholders (R. 212-221).

The Maritime Administration imposed the condition above referred to for the specific purpose of controlling the future use and disposition of vessels transferred to foreign flags (R. 150-151). The vessels involved in this case were each in excess of 1000 gross tons and this condition was always imposed by the Maritime Administration in connection with transfers foreign of such vessels (R. 89, 150-151).

The holdings of the Maryland Court of Appeals that the condition pertaining to the transfer of stock was not a condition with respect to the use and disposition of the vessels, and that a corporation could not agree to such a condition since it could not legally bind its shareholders, severely restricts the power of the Maritime Administration to protect the national interest, and also seriously injures the rights of the Petitioner herein. The decision of the Maryland Court of Appeals ignored national policy which recognizes that control of a corporation is tantamount to control of a vessel owned by it, and improperly interpreted the Maritime Administration's condition, which did not prohibit stockholders from selling their stock, but merely imposed penalties upon the Corporation in the event of sales of stock without approval. The clear implication of the Maryland Court's holding that agreement of the stockholders of a corporation is a prerequisite to the acceptance by the corporation of Maritime's condition pertaining to stock transfers is that Maritime can no longer approve transfers of vessels to publicly held corporations. Whether a State Court can so interfere with and limit the policy, practice and power of a Federal agency, presents a Federal question.

The foregoing Federal question was inherent in the case from the beginning. The lower court passed upon it favorably to Boston and the Maritime Administration. The Court of Appeals of Maryland first clearly defined the question in the majority opinion filed on July 27, 1954, and issue was taken with the decision in a motion for rehearing filed on August 26, 1954 (R. 226).

REASONS FOR GRANTING THE WRIT

1. The majority of the Court of Appeals of Maryland committed serious error in deciding the case below for the following reasons:

(a) The words "conditions . . . with respect to future use and disposition of these vessels" were specifically directed by the parties to an exercise of power by the Maritime Administration under the Shipping Act. Under the familiar doctrine that the courts will refuse to substitute their judgment or discretion for that of administrative agencies, Maritime's determination that the condition which it imposed (restricting the transfer of stock of the corporation owning the vessels) was a condition with respect to the future use and disposition of the vessels, should have been conclusive on the parties and the Court. Cf. *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945); *U. S. ex rel. Roughton v. Ickes*, 101 F. 2d 248 (C.C.A. D. C., 1938).

(b) The condition pertaining to stock transfers was clearly within the ambit of "conditions . . . with respect to future use and disposition of . . . these vessels". Under the Shipping Act, in time of national emergency, the practices and policies of the Maritime Administration are dominated by considerations of national security. The United States was and is committed to a policy, openly pursued, of preventing strategic materials from falling into enemy hands. The subject matter of this contract was three unconverted warships — by definition, strategic materials. Any condition whose purpose is to fairly prevent vessels from passing into unfriendly hands is a condition with respect to the future use and disposition of the vessels.

Contrary to the findings in the Majority Opinion that the Statute itself throws no light on the conditions which Maritime would impose to control the use and disposition of the

vessels Appendix B, *infra*, p. 41, Title 46, U.S.C. Section 835 (d), Appendix A, *infra*, p. 16, contains a clear enunciation of governmental policy so far as transfers of stock in corporate owners of vessels are concerned. It provides that transfers of controlling stock in American corporations shall not be made to aliens, without obtaining Maritime approval. Certainly, no less stringent conditions should be applicable in the case of transfers of stock in foreign corporations.

Effective control by the Maritime Administration of the future use and disposition of the vessels transferred to Astral required some measure of continuing control over the ownership of stock in Astral. For purposes of regulating the use and disposition of the vessels, a disposition of their stock by the owners of Astral was tantamount to a disposition of the vessels themselves. Cf. *Meacham Corporation v. U. S.*, 207 F. 2d 535, 543, (C.C.A. 4th, 1953); *American Union Line v. Oriental Navigation Corp.*, 192 N.Y.S. 154 (1922). The decision below was predicated entirely on the form of the regulatory process rather than upon its substance and realty. Cf. *Commissioner v. Ashland Oil & Refining Co.*, 99 F. 2d 588 (C.C.A. 6th, 1938).

In addition, in holding that the condition pertaining to the transfer of stock was not within the scope of "conditions . . . with respect to future use and disposition of . . . these vessels" (the phraseology used by the parties and the Maritime Administration) the Court below erroneously narrowed the literal meaning of the language used.

(c) Finally, the Court below completely misconstrued the meaning of the condition imposed by the Maritime Administration. It held that the condition pertaining to the transfer of stock could not bind the stockholders of Astral unless they, themselves, agreed to it. What the Court be-

low overlooked was that the Maritime Administration did not intend to bind the stockholders, but intended only to bind the corporation. The condition imposed did not pretend to prohibit the free transfer of stock; it merely contemplated a forfeiture of bond by the corporation if stock were transferred without Maritime's consent. The principal that a corporation cannot bind its stockholders, upon which the Court based its decision, is, therefore, in no way material to this case.

2. The question presented is of extreme importance in the administration of the Shipping Act by the Maritime Administration.

(a) Whether the usual and customary condition imposed by Maritime with respect to future stock transfers in a corporation acquiring an American vessel is effective to control the future use and disposition of the vessel, without the specific assent of the stockholders of such corporation, has never been decided by this Court.

(b) The construction of the stock transfer condition adopted by the Maryland Court jeopardizes the entire program of the Maritime Administration.

As a condition on approval of the transfer of the vessels to Astral, the Maritime Administration required Astral to agree that if there were any transfer of stock interest in Astral to persons not citizens of the United States without the prior approval of Maritime, Astral would pay specified liquidated damages to the United States.

The Maryland Court construed this condition as an attempt by the Maritime Administration to impose a binding condition directly upon the stockholders of Astral, rather

than upon Astral, and held that the condition would be ineffective unless each individual stockholder of Astral, as well as Astral, agreed to it.

The obvious error in this construction has already been pointed out (See p. 7, (c), *supra*). The consequences of this error, however, are manifold, and are of an importance far transcending this case. In the first place, this erroneous construction jeopardizes the future enforcement of conditions already imposed by Maritime in accordance with its long standing practice in connection with transfers of vessels already consummated.

Second, if the Maryland Court's construction were correct, it is obvious that in order to attain its objective of retaining control over transferred vessels, Maritime hereafter would have to obtain the consent of individual stockholders in the case of each transfer. Where large, publicly held corporations were involved, this obviously would be impossible, and the lawful purpose and practice of the Maritime Administration under its statutory authority to protect the national interest with regard to ships and shipping would be thwarted, to the great detriment of the United States government and its people.

See *Paterson v. Lamb,* 329 U.S. 539, 542 (1947), where the United States Supreme Court granted certiorari to review a case in which a decision of a lower court upset years of important War Department rulings and practices which affected, and would thereafter affect, the status and claims of draftees of the First World War.

(c) Finally, with respect to the condition in issue, the General Counsel of the Maritime Administration wrote to Petitioner as follows:

> ". . . this likewise is a standard provision which has always been applied as a condition to approvals for transfers foreign given by the Maritime Administrator for vessels of this size. This condition is attached because the holders of the stock of a corporation not only directly affect the character of the corporate buyer, but also are in a position directly to control the future use and disposition of the vessels for which permission to transfer foreign is given. Obviously, the stock control, whether by virtue of the majority ownership or by virtue of a minority interest, is a factor directly affecting the future use and disposition of the vessels. Although approval of such transfers of stock is normally given as matter of routine, it is considered essential in the national interest that this power of approval be retained to assure that the future use and disposition of the vessels shall not be in conflict with the national interests of the United States." (R. 151).

Thus, as is evident from the Statutes involved, Appendix A, p. 13, *infra,* and the letter of General Counsel, *supra,* it is the lawful intention of the Maritime Administration to control "the future use and disposition of vessels" under its jurisdiction, when they are transferred to foreign flags in time of emergency, as declared by the President. To do so, Maritime has adopted certain conditions which it customarily imposes on approval of these transfers. The Maryland Court of Appeals has held in this case that one of these standard conditions is not "a condition on future use and disposition" of vessels. This reflects such a basic disagreement between Maritime and the Court of Appeals of Maryland, that for the purpose of effectively carrying out its duties and responsibilities under the law, Maritime should have the benefit of this Court's judgment on the construction of the condition involved.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NOLAN P. CHIPMAN,
Counsel for Petitioner,
1000 Baltimore Life Bldg.,
Baltimore 1, Md.

GORDON & FEINBLATT,
Of Counsel,
1000 Baltimore Life Bldg.,
Baltimore 1, Md.

December, 1954.

APPENDIX A

The relevant portions of the "Shipping Act, 1916" as amended (46 U.S.C.A. Secs. 801 to 842), are as follows:

"Sec. 802. CORPORATION, PARTNERSHIP, OR ASSOCIATION AS CITIZEN. (a) Within the meaning of this chapter no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or, (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens

of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizens of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding, it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States. Sept. 7, 1916, c. 451, sec. 2, 39 Stat. 729; July 15, 1918, c. 152, sec. 2, 40 Stat. 900; June 5, 1920, c. 250, sec. 38, 41 Stat. 1008."

"Sec. 808. REGISTRATION, ENROLLMENT, AND LICENSING OF VESSELS PURCHASED, CHARTERED, OR LEASED; REGULATIONS; COASTWISE TRADE. Any vessel purchased, chartered, or leased from the United States Maritime Commission, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: Provided, That foreign-built vessels admitted to American registry or enrollment and license under this chapter, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the commission to any person a citizen of the United States, as provided in this chapter, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

Every vessel purchased, chartered, or leased from the commission shall, unless otherwise authorized by the commission, be operated only under such registry

or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States, or the last documentation of which was under the laws of the United States.

Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violated any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both. Sept. 7, 1916, c. 451, sec. 9, 39 Stat. 730; July 15, 1918, c. 152, sec. 3, 40 Stat. 900; June 5, 1920, c. 250, sec. 18, 41 Stat. 994; Ex. Ord. No. 6166, sec. 12, June 10, 1933; June 29, 1936, c. 858, secs. 204, 904, 49 Stat. 1987, 2016; June 23, 1938, c. 600, sec. 42, 52 Stat. 964."

"Sec. 835. RESTRICTIONS ON TRANSFER OF SHIPPING FACILITIES DURING WAR OR NATIONAL EMERGENCY. When the United States is at war or during any national emergency, the existence of which is declared by

proclamation of the President, it shall be unlawful, without first obtaining the approval of the commission:

(a) To transfer to or place under any foreign registry or flag any vessel owned in whole or in part by any person a citizen of the United States or by a corporation organized under the laws of the United States, or of any State, Territory, District, or possession thereof; or

(b) To sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, (1) any such vessel or any interest therein, or (2) any vessel documented under the laws of the United States, or any interest therein, or (3) any shipyard, dry dock, shipbuilding or ship-repairing plant or facilities, or any interest therein; or

(c) To enter into any contract, agreement, or understanding to construct a vessel within the United States for or to be delivered to any person not a citizen of the United States, without expressly stipulating that such construction shall not begin until after the war or emergency proclaimed by the President has ended; or

(d) To make any agreement or effect any understanding whereby there is vested in or for the benefit of any person not a citizen of the United States, the controlling interest or a majority of the voting power in a corporation which is organized under the laws of the United States, or of any State, Territory, District, or possession thereof, and which owns any vessel, shipyard, dry dock, or shipbuilding or ship-repairing plant or facilities; or

(e) To cause or procure any vessel constructed in whole or in part within the United States, which has never cleared for any foreign port, to depart from a port of the United States before it has been documented under the laws of the United States.

Whoever violates, or attempts or conspires to violate, any of the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not more than $5,000 or by imprisonment for not more than five years, or both.

Any vessel, shipyard, dry dock, shipbuilding or shiprepairing plant or facilities, or interest therein, sold, mortgaged, leased, chartered, delivered, transferred, or documented, or agreed to be sold, mortgaged, leased, chartered, delivered, transferred, or documented, in violation of any of the provisions of this section, and any stocks, bonds, or other securities sold or transferred, or agreed to be sold or transferred, in violation of any of such provisions, or any vessel departing in violation of the provisions of subdivision (e) of this section, shall be forfeited to the United States.

Any such sale, mortgage, lease, charter, delivery, transfer, documentation, or agreement therefor shall be void, whether made within or without the United States, and any consideration paid therefor or deposited in connection therewith shall be recoverable at the suit of the person who has paid or deposited the same, or of his successors or assigns, after the tender of such vessel, shipyard, dry dock, shipbuilding or shiprepairing plant or facilities, or interest therein, or of such stocks, bonds, or other securities, to the person entitled thereto, or after forfeiture thereof to the United States, unless the person to whom the consideration was paid, or in whose interest it was deposited, entered into the transaction in the honest belief that the person who paid or deposited such consideration was a citizen of the United States. Sept. 7, 1916, c. 451, sec. 37, as added July 15, 1918, c. 152, sec. 4, 40 Stat. 901; amended Ex. Ord. No. 6166, sec. 12, June 10, 1933; June 29, 1936, c. 858, secs. 204, 904, 49 Stat. 1987, 2016."

"Sec. 839. APPROVALS BY COMMISSION. Whenever by section 808 or 835 of this title the approval of the commission is required to render any act or transaction lawful, such approval may be accorded either absolutely or upon such conditions as the commission prescribes. Whenever the approval of the commission is accorded upon any condition a statement of such condition shall be entered upon its records and incorporated in the same document or paper which notifies the applicant of such approval. A violation of such condition so incorporated shall constitute a misdemeanor and shall be punishable by fine and imprisonment in the same manner, and shall subject the vessel, stocks, bonds, or other subject matter of the application conditionally approved to forfeiture in the same manner, as though the act conditionally approved had been done without the approval of the commission, but the offense shall be deemed to have been committed at the time of the violation of the condition.

Whenever by this chapter the approval of the commission is required to render any act or transaction lawful, whoever knowingly makes any false statement of a material fact to the commission, or to any member thereof, or to any officer, attorney, or agent thereof, for the purpose of securing such approval, shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both. Sept. 7, 1916, c. 451, sec. 41, as added July 15, 1918, c. 152, sec. 4, 40 Stat. 902; Ex. Ord. No. 6166, sec. 12, June 10, 1933; June 29, 1936, c. 858, secs. 204, 904, 49 Stat. 1987, 2016."

APPENDIX B

The Opinion of the majority of the Court of Appeals of Maryland (Brune, C.J., Delaplaine, J., and Collins, J.) is as follows:

Brune, Chief Judge:

Boston Metals Company (hereinafter called "Boston"), a Maryland corporation, brought suit in the Baltimore City Court against Compania de Astral, S. A. (hereinafter called "Astral"), a Panamanian corporation, for breach of a contract for the sale of three vessels. Astral appeared specially and moved to quash the summons and dismiss the suit. This motion was denied by Judge Warnken. After further pleadings the case went to trial before Judge Moser, without a jury, and resulted in a judgment for Boston for approximately $274,000. Astral's appeal brings up both the rulings on the motion and on the question of breach of contract. The latter question turns on the meaning of the contract, under which approval by the United States Government of the transfer of the vessels to the flag of Panama was required and Astral agreed to accept conditions to such approval relating to the "future use and disposition" of the vessels.

The principal questions at issue are these: (1) Was the contract between Boston and Astral made in Maryland, so that Astral is amenable to suit thereon in this State under Code (1951), Article 23, Section 88(d); (2) if so, is that statute constitutional; and (3) were the conditions imposed by the Maritime Administration on the transfer of the vessels within the scope of those to which Astral assented under the terms of the contract?

There is little, if any, dispute about the facts, which are summarized below.

Boston, the plaintiff-appellee, is a Maryland corporation having its principal office and its yard in Baltimore, Mary-

land, and is there engaged in the business of buying, selling and scrapping ships. Astral is a Panamanian corporation having its principal place of business in the City and Republic of Panama, and is engaged in the business of exporting bananas from Ecuador to the United States and other countries. It has a selling agent in New Orleans, Louisiana, the Estrella Fruit Selling Corporation (hereinafter sometimes called "Estrella"), but it has no office in the United States. Prior to the institution of this suit it was not "doing business" in Maryland within the meaning of Code (1951), Article 23, Section 88. Its contacts with Maryland and its activities and transactions in this State pertained to the contract involved in this case and to the three vessels whose sale constituted the principal subject-matter thereof.

In 1946 Boston bought three frigates from the United States Navy. They had been built in Canada during World War II and were relatively long, narrow, fast and of shallow draft. However useful they may have been in wartime, they were not well adapted for peacetime commercial use and would require considerable changes to convert them for such use. After Boston purchased them it thought they might be sold for use as commercial vessels, doubtless at a better price than would have been realized by scrapping them. In 1947 Boston advertised the frigates for sale, but up to January, 1952, it received no firm offer for them. The ships remained in the harbor of Baltimore from 1946 until they were finally scrapped there in 1953.

At some time prior to January 9, 1952, Astral became interested in the possibility of acquiring vessels of the frigate class and converting them for use as banana boats. On that date, Mr. Folke Anderson, of New York, who is described as "foreign representative" for Astral, submitted an offer on behalf of Astral of $75,000 apiece for Boston's three frigates. This offer was made through a New York ship brokerage firm, W. R. Blackburn & Co., which had these craft on its list of available vessels. This offer was transmitted to Boston, but was rejected as inadequate. Further negotiations followed.

Early in February, 1952, Mr. Gustav E. Petterson, President of Estrella, who also acted as a representative of Astral, came to Baltimore and made a preliminary inspection of the vessels there. On February 6, 1952, Messrs. Petterson and Anderson, acting as representatives of Astral, conferred with officers of Boston and its counsel at Boston's office in Baltimore. A proposed contract was drafted at this conference which provided, among other things: (1) for the sale of the three vessels then in the harbor of Baltimore on an "as is where is" basis, at the price of $400,000; (2) for the purchaser to obtain approval of the transfer, with the cooperation of the vendor; (3) for the purchaser to deposit in escrow with a Trust Company in Baltimore a fund of $80,000; (4) for inspection of the frigates by the purchaser, with the right to reject any of them whose condition might be unsatisfactory, subject to the further provision that the rejection of any one of the three would operate as a rejection of all and would terminate the contract; (5) for the delivery of the vessels and bills of sale, and payment of the balance of the purchase price within fifteen days of the signing of the contract or upon obtaining Government approval of the transfer; (6) for returning the moneys remaining in the escrow fund if such approval was not obtainable; and (7) that if the purchaser defaulted in the payment of the purchase price, the amount of the deposit remaining in escrow should be paid to the vendor as liquidated damages. Other provisions dealt with the payment of towing, shifting and drydocking charges for inspection purposes, the payment of a commission to the brokers, the use to which the vessels were to be put, the law to govern the interpretation or construction of the contract, which was to be the law of Maryland, and the retention of title by the vendor and the right of resale in case of default by the purchaser. These latter provisions were either the same or not materially different from those dealing with the same subjects which were embodied in the agreements later executed, and for that reason are not further commented upon at this point.

On the next day, February 7th, Mr. Anderson, accompanied by Mr. Blackburn, conferred with Mr. Anderson's and Astral's counsel in New York at the latter's office. Several changes in the proposed contract were suggested, Boston was advised of them and a further conference was held on February 11th, 1952, in New York at the office of Astral's counsel. This conference was attended by Mr. Blackburn, the broker, by counsel for Astral, counsel for Boston, an officer of Boston and Messrs. Anderson and Petterson, as representatives of Astral.

At this conference the proposed contract drafted on February 6th was revised; and, among other changes, it was split into two parts, one of which was dated February 18th and the other February 19th, 1952. These two agreements (apart from a notification later referred to) constituted the contract between the parties. They were subsequently executed by Astral in Panama and apparently on the same date, which is not shown but which was prior to February 23, 1952. They were executed substantially simultaneously by Boston at its office in Baltimore on February 23, 1952.

The first agreement (dated February 18) provided for the sale by Boston and the purchase by Astral of "one or more" of three named frigates then in the harbor of Baltimore on an "as is, where is" basis, at the price of $400,000 if all three were purchased, $270,000 for two if only two were purchased, and $137,500 for one if only one were purchased. Subsequent provisions called for Astral to inspect the ships within twenty-one days after both parties signed the contract and required Astral to notify Boston within a time limit of its acceptance or rejection of one, two or three of the vessels. Astral had the right to inspect the vessels afloat or on drydock and to "reject one or more of these frigates if the condition of such is unsatisfactory to the Purchaser." There were further provisions with regard to the payment by Boston or Astral of the cost of towing, shifting and drydocking the vessels, depending upon the number of them which Astral might reject or accept.

Other provisions of the first agreement required Astral to deposit in escrow the sum of $80,000 with a Trust Company in Baltimore. This deposit was required to be made (and was made) on the signing of the contract by both parties. The fund was to be paid over to Boston, together with other funds to be furnished by Astral necessary to make up the purchase price of the vessel or vessels purchased, on delivery of proper bills of sale for the vessel or vessels purchased "after Government permission for the transfer has been obtained." If such permission was not obtained within thirty days of the signing of the contract by both parties, the escrow fund was to be paid over to Astral, less any towing, shifting or drydocking costs chargeable to and not already paid by Astral. The liquidated damages provision of the draft of February 6th was eliminated.

Paragraph 2 of the first agreement provided that "Permission for change of flag of these frigates to Panama shall be obtained by the Vendor with the cooperation of the Purchaser, thus reversing the corresponding provision of the February 6th draft.

Under Paragraph 9 Astral "warrants that on completion of this purchase the vessels will be used by it for the transportation of passengers or property in foreign commerce."

By other provisions title to the vessels was to remain in Boston until payment of the full purchase price in cash, and in case of failure of Astral to carry out the contract Boston might sell to others any one or all of the frigates for its own account. Boston was also to pay a 5% commission to W. R. Blackburn & Co. "as brokers for distribution."

Paragraph 11 reads as follows: "In case of enforcement of this contract, or dispute as to interpretation or construction of this contract, the substantive laws of the State of Maryland, United States of America, shall apply."

The second document, dated February 19th, 1952, provided as follows:

"1. It is hereby mutually agreed between the parties hereto that the agreement heretofore executed between them dated February 18th, 1952, for the purchase of one or more frigates, shall remain in full force and effect between the parties for an additional period of forty-five days notwithstanding the clause in the said agreement providing that it shall be void if the approval of the Government to the transfer shall not be obtained within thirty days from the signing of the said agreement.

2. If either or both the Maritime Administration or the United States Navy has jurisdiction over this transfer, and approves said transfer subject to conditions prescribed by them or either of them with respect to future use and disposition of any or all of these vessels, such approval will amount to approval of the United States Government as provided for in the contract dated 18th February, 1952."

Following the conference of February 11th, W. R. Blackburn & Co., which held an exporter's license, filed applications with the State Department for licenses for each of the three vessels "to export arms, ammunition and implements of war." These applications were dated February 13, 1952. Mr. Blackburn testified that he obtained the information contained in the responses concerning Astral from Mr. Anderson. Item 9 inquired the specific purpose for which the material was required and the name and address of the ultimate consumer abroad. The answer was "To be converted to refrigerated banana carrier in the United States or Canada for the purchaser who is the ultimate consignee." At a later point (under Items 14 and 15 relating to quantity and commodity), it was stated, "Sold for conversion to refrigerated banana carrier before leaving the United States or Canada depending on where lowest price received for conversion. All armament removed. Conversion cost has been estimated at approximately $300,000."

On or about February 28, 1952, Mr. Petterson and a Mr. Hurst, who was a marine surveyor acting for Astral, inspected the three vessels in drydock in Baltimore, and on

February 29th applications to the Maritime Administration for transfer of the frigates were executed in Baltimore on behalf of Boston and were signed on behalf of Astral by Mr. Petterson. On the same day Astral's Board of Directors held a meeting in Panama and authorized the purchase of three vessels for the Company and the transfer thereof to the registry and flag of Panama and also authorized the granting of a power of attorney, which was executed and recorded on that day, empowering Gustav Petterson (described as "of New Jersey") to effect the authorized purchase and transfer of vessels "under the terms and conditions which he believes will best serve the interest of" Astral.

On March 20, 1952, the State Department granted the export license applied for under date of February 13th.

On March 21, 1952, Mr. Petterson wrote a letter to Boston on the letterhead of Estrella notifying Boston that Astral would buy all three frigates mentioned in the agreement of February 18th, 1952.

On April 9, 1952, the Maritime Administration approved the sale of the vessels to Astral and the proposed transfer of flag and registry of the frigates upon certain conditions among which were the following:

(1) That the vessels be converted in a United States shipyard;

(2) That for the duration of the National Emergency proclaimed by the President on December 16, 1950, there should be no change in the ownership or registry of the vessels nor should "there be any transfer of stock interest in ** [Astral] to persons not citizens of the United States without the prior approval of the Maritime Administration.

(3) That in the event of default in the observance of the above conditions or certain others, Astral should pay to the Maritime Administration the sum of $25,000, as liquidated

damages and not as a penalty, for each vessel involved in the default; and

(4) That Astral and a surety company licensed by the United States Treasury should execute and deliver to the Maritime Administration a bond in the amount of $75,000 to secure Astral's performance and observance of the prescribed undertakings and conditions, or that Astral deposit cash or Government bonds. All of the above mentioned conditions, except that prohibiting a change of ownership or registry of the vessels without the consent of the Maritime Administration are now objected to by Astral. The conversion and stock transfer conditions were objected to at once. Certain other conditions requiring Astral to sell or charter the vessels to the United States and prohibiting their use for purposes forbidden to United States flag vessels under certain orders of the Department of Commerce, were also conceded to be in order under the terms of the contract between Boston and Astral.

Efforts to induce the Maritime Administration to recede from the conditions to which Astral objected were not successful. Astral claimed that it was discharged from any obligation under the contract by reason of these conditions, and Boston took the opposite position. Boston eventually sold the vessels at a public sale, bid them in itself and scrapped them. No question is raised with regard to the propriety of the sale or the adequacy of the price bid by Boston. Neither is there any question as to the amount of damages, if Astral is liable to Boston under the contract.

There was testimony by an Administrative Assistant employed by the Maritime Administration and there was a letter from its General Counsel to one of Boston's attorneys to the effect that the conditions imposed as to the conversion of the frigates and as to transfers of stock of Astral were usual. The Administrative Assistant also testified that all of the conditions were usual in the case of naval vessels of more than 1,000 gross tons, and that the Maritime Administration did not give consent to the transfer

of the frigates here involved until it had ascertained that the State Department had granted export licenses for these vessels and that copies of such licenses were in the Maritime Administration's files.

There was also testimony to show that Astral sought bids on conversion from several American and Canadian shipyards and that an American yard (the Bethlehem Steel Company's Key Highway yard in Baltimore) was the low bidder. It is not clear whether bids were obtained from yards in other countries, but there was testimony by Mr. Petterson to indicate that Astral was considering having the conversions made in a Scandinavian or other European yard, where the cost would be much less than in the United States, and that Astral had sought and obtained bids for towing the frigates across the Atlantic. Bethlehem's bid for all three vessels was at the rate of $420,000 per vessel, or $120,000 per ship in excess of the estimated cost stated in the application for the State Department export license.

The first question of law is whether the contract was or was not made in Maryland. There is no room for doubt that some obligations were imposed and became effective as soon as Boston signed the contract in Maryland. Among these was Astral's obligation to put up the $80,000 escrow fund with the Union Trust Company of Maryland at one of its offices in Baltimore, which was immediately complied with. Another was Astral's obligation to inspect the vessels and to notify Boston within twenty-one days thereafter of its acceptance or rejection of one, two or three of them. This latter obligation Astral met within the time limit by Mr. Petterson's letter of March 21, 1952, notifying Boston of Astral's acceptance of all three. This notification was received by Boston at its office in Maryland. Whether the contract is construed (1) as creating an obligation on Astral's part to purchase all three vessels, defeasible, however, as to any or more of them if they should be found upon inspection by Astral to be in unsatisfactory condition, or (2) as granting an option to Astral to purchase one, two or all three by notifying Boston in writing within the time

prescribed of its election to buy one, two or three, we think that the contract was made in Maryland. In either event, in our view, the final act necessary to the completion of the contract — that is, to make it a binding obligation — was done in Maryland, and Maryland is consequently the place where the contract was made. *Sun Insurance Co. v. Mallick*, 160 Md. 71, 153 A. 35; *Union Trust Co. v. Knabe*, 122 Md. 584, 89 A. 1106; *1 Williston on Contracts* (Rev. Ed.) Section 97.

Under the first of the two suggested constructions there would appear to be no basis for a contrary contention. Under the second construction, however, Astral contends that the original contract amounted only to an offer by Boston to sell the frigates and that Astral accepted this offer by mailing an acceptance in Louisiana, and that Louisiana is consequently the place of the making of the contract. We do not agree. Even if the agreement dated February 18th be considered as not amounting to a contract for the sale of the vessels, but only as the grant of an option to buy them, the terms of that "option" required Astral, if it elected to purchase, to notify Boston in writing of its acceptance of one, two or three vessels. This, we think, contemplated not merely the mailing of a letter from Panama, New Orleans or anywhere else, but the actual receipt of such notice by Boston. This took place in Maryland.

As is said in *1 Corbin on Contracts* (1950 Ed.), Section 264:

"But when, by the terms of an already consummated contract it is provided that one party shall have the power to produce certain legal results by giving notice, it is usually held that this means notice received in fact and not merely notice mailed * * * The rule that an acceptance by post is operative on mailing was itself subjected to severe criticism; and even though it may now be regarded as settled, it should not be extended to notice of acceptance in already binding option contracts."

See also 1 *Williston on Contracts* (Rev. Ed.), Section 87, note, page 248.

Since we hold that the final act which made the agreement a binding contract took place in Maryland, the cases of *Park Beverage Co. v. Goebel Brewing Co.*, 197 Md. 369, 79 A. 2d 157, and *Cole v. Randall Park Holding Co.*, 201 Md. 616, 95 A. 2d 273, cited by the appellant, involving situations in which preliminary negotiations took place in Maryland, but final arrangements were effected in other states, are not applicable.

The second question is whether or not Code (1951), Article 23, Section 88 (d) is constitutional, as applied to the facts of this case. In the *Park Beverage Co.* case just referred to, this Court found it unnecessary to pass upon the validity of this Section because the contract there involved was not made in Maryland and the Section was, therefore, inapplicable. In the instant case, however, our holding that the contract was made in Maryland brings the question up for consideration. If the statute is invalid, the judgment of the lower court must be reversed and the suit dismissed; and, on the other hand, if we have jurisdiction to determine the case on the merits, such jurisdiction must be founded upon the validity of the statute.

The text of Section 88 (d) is as follows:

"Every foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business in this State on any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State."

This provision was first enacted by Chapter 504 of the Acts of 1937, and it has remained unchanged since that time. That Act made considerable changes in the laws relating to the amenability of foreign corporations to suit in Maryland, and also made some changes in the provisions

for service of process. In an article entitled *"Jurisdiction of Maryland Courts over Foreign Corporations Under the Act of 1937"*, Professor Reiblich presented a comprehensive analysis of the provisions dealing with jurisdiction and of the constitutional questions raised thereby. He suggested several relatively minor amendments to the new law in order to reduce or avoid the danger of successful attacks on constitutional grounds, and one amendment made in 1941 and another in 1943 seem to have been directed to this end. Two others were included in the major revision of the General Corporation Laws effected by Chapter 135 of the Acts of 1951. None of these changes amended Section 88 (d) nor did Mr. Reiblich recommend any changes therein, though he clearly recognized the possibility of attack upon it.

The attack in this case on the constitutionality of Section 88 (d) is limited to considerations of due process under the Federal and State Constitutions, and on this issue it is confined to the question of the jurisdiction of the State of Maryland to subject Astral, on the facts here presented, to suit in a Maryland court. No objection is made to the sufficiency of the provisions of the Maryland law with regard to the giving of notice of the suit, and no attack is made under the commerce clause of the Federal Constitution.

Section 88 (d) is subject to a separability clause Code (1951), Article 23, Section 1 (b) reading as follows:

"If any provision of this Article or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of the Article, and the applicability of such provision to other persons or circumstances, shall not be affected thereby." (A virtually identical clause was contained in Section 13 of Chapter 504 of the Acts of 1937.) By reason of this clause, we are not concerned with any factual situation other than that here presented. We may agree with the appellant that the mere mailing in Maryland of acceptance of an offer would

not be sufficient to sustain a suit brought here under the statute against the challenge of due process, but that does not dispose of this case.

Undoubtedly, we are in a comparatively novel field. Section 88 (d) by its terms extends jurisdiction over foreign corporations in suits by residents or by other persons having a usual place of business in Maryland to cover causes of action arising from contracts made or acts done in this State, regardless of whether or not the foreign corporation is doing business or has been doing business in this State. In discussing the due process aspect of this extension Professor Reiblich says:

"This is an apparent attempt to extend to corporations a basis of jurisdictional power recently recognized for natural persons [citing *Hess v. Pawloski*, 274 U. S. 352, *Doherty v. Goodman*, 294 U. S. 623, and referring for comparison to other authorities]; but to extend it in a more extensive fashion than has as yet been recognized in any opinions of the courts.

"As a bar to the validity of sub-division (d) there stand repeated statements of the courts to the effect that in the absence of 'consent' or 'doing business' there is no basis for the assertion of jurisdiction over the foreign corporation.

* * * * * *

"The old cases do not stand as authority on this new development. They were not decided under statutes which attempted to assert (and at the same time limit) jurisdiction as to causes of action arising out of the particular act done. They were attempting to assert a general personal jurisdiction based on the doing of business as a contact sufficient to support it.

"The question of * [the] extension to corporations [of jurisdiction based on the doing of an act or acts (not amounting to 'doing business' within the state, but limited causes of action arising out of that very act or acts)] must be answered by determining whether it is unreasonable

to subject the foreign corporation to similar control. It is not apparent why such assertion of power is any less reasonable as applied to corporations than as applied to individuals."

After raising the question whether or not such jurisdiction may extend to any kind of act done within the state and concluding, on the basis of the *Hess* and *Doherty* cases that it cannot, he suggests that personal jurisdiction over a foreign corporation (or individual) as to causes of action arising out of an act done within the state may properly be asserted "to the extent that it is a reasonable exercise of the state's regulatory control under all of the facts involved." This, we think, closely approximates the test laid down in *International Shoe Co. v. Washington*, 326 U. S. 310, decided about seven years later.

Pennoyer v. Neff, 95 U. S. 714, no longer fully states the rules of due process as applied to suits against non-resident individuals. *Kane v. New Jersey*, 242 U. S. 160, and *Hess v. Pawloski*, 274 U. S. 352, firmly established the rule that a non-resident motorist using the highways of a state other than his own may be subjected to suit in the courts of that state on a cause of action arising out of his operation of a motor vehicle on its highways. Beginning (as in the *Kane* case) with the type of law which required, as a condition to the use of the highways of the state, the actual appointment of a state official as the agent of a non-resident motorist upon whom process might be served, the usual type of state law soon became (as in the *Hess* case) that under which the non-resident motorist's use of the highways of the state was deemed the equivalent of the actual appointment of such an official. *Doherty & Co. v. Goodman*, 294 U. S. 623, likewise established the amenability to suit within a state of a non-resident individual carrying on business through an agent in that state, if process is served on his agent there, even though the non-resident principal has not authorized the agent to accept service of process. In the *Doherty & Co.* case, *Flexner v. Farson*, 248 U. S. 289, was explained on the ground that the person upon whom service

was made in that case had ceased to be an agent of the non-resident individual defendant prior to the time when service was made upon him.

In Maryland the validity of our statute making non-resident motorists amenable to suits in courts of this state on causes of action arising out of their operation of motor vehicles in this state has been upheld. *Employers Liability Corp. v. Perkins,* 169 Md. 269, 181 A. 436.

Just as the doctrine of *Pennoyer v. Neff* dealing with non-resident individuals has undergone limitation, so has the doctrine of such cases as *Phila. & Reading Ry. Co. v. McKibbin,* 243 U. S. 264, and *Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.,* 260 U. S. 516, relating to foreign corporations. The test of jurisdiction is no longer solely or necessarily whether the acts of the foreign corporation within the state amount to "doing business." It may be noted in this connection that the Maryland General Corporation Laws specifically provide that an isolated transaction shall not constitute doing business (Article 23, Section 8(b)(6)). This clearly exempts a foreign corporation engaging in a single transaction from the general requirements to qualify and to appoint a resident agent, which foreign corporations doing an intrastate business must meet. It likewise serves to exempt the "one-transaction" foreign corporation from the broad amenability to suit in Maryland which attaches to foreign corporations "doing business" in this state, whether they duly qualify or not. It also points up the narrowness of the field in which the one-transaction" foreign corporation is amenable to suit in Maryland — that is in a suit by a resident or a person having a regular place of business in Maryland arising out of a contract made or an act done in Maryland.

The non-resident motorist cases have shattered any argument to the effect that a single transaction by a non-resident may not be made the basis for amenability to suit in the state where the transaction occurred. The *Doherty & Co.* case has rendered untenable any contention that a con-

tract made within a state cannot serve as the basis for suit in that state against a non-resident party to the contract.

The appellant distinguishes these cases on the ground that they involve applications of the police power, its exercise in the *Doherty & Co.* case being based upon the state's concern with the sale of securities. The appellant points out that no case decided by the Supreme Court has upheld a suit such as this based upon a single contract, which the appellant claims is not within the scope of the police power. From the absence of such authority, the appellant argues that the power of the state to entertain this suit cannot be sustained. This, we think, is not a necessary consequence.

The rule announced by the Supreme Court in *International Shoe Co. v. Washington*, 326 U. S. 310, is that by which we believe the jurisdiction of Maryland is to be tested in this case. There the foreign corporation, which sought to avoid both local taxation and amenability to local suit, was found to be engaged in systematic and continued activities within the state, and hence that case is not comparable on its facts to the instant case. On the other hand, the test applied was not expressed in terms of whether or not the foreign corporation was "doing business" in the state. (See *Thomas v. Hudson Sales Co.*, ... Md. ...., 105 A. 2d 225.) On the contrary, the Supreme Court laid down a much broader test which we believe to be applicable here. The Court said:

"Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' * * *.

"Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U. S. 516,

other such acts because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. * * *

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit and those which do not cannot be simply mechanical or quantitative. * * * That clause [due process] does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. Cf. *Pennoyer v. Neff* ** [95 U. S. 714]; *Minnesota Commercial Association v. Benn*, 261 U. S. 140.

"But to the extent that a corporation exercise the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

The only case previously decided actually turning upon what is now Section 88(d) is *Johns v. Bay State Abrasive Products Co.*, 89 Fed. Supp. 654 (D. C., Md.), in which Judge Chesnut upheld the statute as applied to a tort claim based upon a liability incurred in Maryland. Judge Chesnut carefully reviewed and analyzed the cases bearing on the question. He concluded that on the facts, as they appeared on a preliminary motion, one of the defendant non-resident corporations was doing more in Maryland than simply engaging in one isolated transaction, though it was not "doing business" in Maryland. He relied particularly upon the *International Shoe Co.* case. *United States v. Scophony Corp.*, 333 U. S. 795, also referred to by Judge Chesnut, is concerned with a question of venue, rather than jurisdiction, but the opinion contains this brief summary of the transition through which theories relating to the amenability of a foreign corporation to suit in a particular juris-

diction have gone: "The conventional rationalization applied equated 'found' in sequence to 'presence,' to 'doing business by its agents there,' to 'of a character warranting inference of subjection to the local jurisdiction.' "

It is against this background of development of the law that the validity of Section 88(d), as applied to the facts of this case, must be determined. On the basis of contacts with the State of Maryland, we find that the vessels which were the principal subject matter of the contract were here (and had been here for years), that one of Astrals representatives came here to inspect them, that this inspection was followed by a visit by him and by another representative of Astral to Maryland and negotiations between them and Boston's representatives, which reached a general agreement as to price and as to many of the terms of the final contract, including an express provision that the law of Maryland (changed in the final contract to read "substantive law") should be controlling in the construction or interpretation of the contract, and a provision for establishing an escrow fund here (though certain material terms of the escrow provision were later altered), that the contract after being executed by Astral in Panama became effective when executed in this State by Boston, that the physical documents embodying the contract were brought into this State by a representative of Astral for the purpose of their being so executed, that this representative also brought with him and delivered to the escrow agent in Maryland a cashier's check for $80,000 to establish the escrow fund called for by the contract to be established here, and a letter of instruction from Astral with regard thereto, that further, in accordance with the contract, Astral inspected the vessels in Baltimore, that it sent to Boston at its office in Maryland a notification of acceptance of all three vessels, that it signed in Maryland, as the prospective purchaser, the application which Boston, as seller, was required to make to the Maritime Administration for transfer of the vessels, and that the place of performance of the contract — that is, the place for the delivery of the vessels and for payment of the purchase price — was Maryland.

All of these things (and also some local negotiations between Astral and Boston with regard to the conditions imposed by the Maritime Administration, the local character of which seems to us unimpressive), it is true, related to what was but a single transaction; but all told, they add up to considerable contact with this State and considerable reliance upon its laws and the protection which they afforded. The statute in question is not within the scope of a narrow meaning of the police power, as the non-resident motorist statutes, statutes regulating the sale of securities and statutes (as in *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U. S. 93, or *Travelers Health Ins. Co. v. Virginia*, 339 U. S. 643) regulating the insurance business clearly are.

Within the fields of these cases we take it that the validity of statutes subjecting non-residents to local suits is settled. Beyond those limits, the question under the rule of the *International Shoe Co.* case is the sufficiency of the local contacts to warrant subjecting the non-resident to suit. We may note that in the case of foreign corporations a less rigorous standard may suffice than in the case of individuals, for the reason that a state is generally without power to exclude an individual non-resident from doing business or making contracts in the state, but may generally completely exclude foreign corporations or may admit them only subject to conditions. See *Reiblich, op.* cit., at 3 Md. Law Review 71.

The same type of considerations as are pertinent under the doctrine of *forum non conveniens* are applicable in balancing the respective interests of the local plaintiff and the foreign corporation, and in determining whether the latter's contacts with the state are sufficient to warrant its being held accountable in a local suit. These considerations of convenience, though lightly dismissed by the appellant, have been accorded statutory recognition in U. S. C. A., Title 28, Section 1404(a), enacted in 1948, and in Article 23, Section 88(b) of the Maryland Code, as enacted in 1951. The application of such considerations to the present case

may be seen from the fact that every one of the witnesses who testified was a citizen or resident of the United States. Five of them lived or were employed in Baltimore, one in New York, one in Washington and one in New Orleans. All but the last were within less than two hundred miles of the place of trial. There was no witness from Panama, and the only documentary evidence contained in the joint appendix which was produced from there was small in volume and easily procurable and transmissible. It covers two and a half pages in a joint appendix of a hundred and seventy-five pages.

Professor Reiblich, in his article in 3 *Md. Law Review*, at 70, concluded his discussion of the present Section 88(d) and due process by saying that it "represents a sound social policy and should be sustainable against the due process objection." In support of this view he relied upon the acceptance of such a rule by other countries, upon the state's interest in affording to its citizens the convenience of litigating in their own state disputes growing out of contracts made there and in seeing that the contract is controlled by the law which it regards as applicable, and upon the convenience of the plaintiff as to the place of trial being sufficient to tip the scales of due process in his favor, in view of the defendant's having come to the plaintiff's jurisdiction to make a contract with him. All of these factors are present in the instant case and one of them (the applicability of Maryland law) is specifically provided for by the contract.

A note in 38 *Columbia Law Review* 1060, entitled *"Revision of the Maryland Corporation Law: An Advance,"* in dealing with the jurisdictional and service of process provisions of Chapter 504 of the Acts of 1937 which were applicable to foreign corporations, among other things, described subsection (d) of what is now Section 88 as "unique" and concluded with this paragraph:

"As for the 'contracts made' within the state, it is equally an 'act within the jurisdiction', but no case has been decided

on the point. But as jurisdiction over the act done within the state may be justified because the state ought to have some measure of rule over activities within its precincts, so jurisdiction over contracts is supportable on the ground that if the state may make the law of the contract, it may properly lay claim to prior rights in administering the law. As for protection of its residents, there could surely be no distinction between the causing of tort or of contractual harm.* The concept embodied in the subsection is at best embryonic, but may soon find expression in the cases."

A note on *Johns v. Bay State Abrasive Products Co., supra,* in 64 Harvard Law Review 500-502, approves the result of that case and states: "Although the court carefully limited its approval of the statute to the factual circumstance of continuous solicitation within the state, it would seem that even without the slight solicitation present, the statutory declaration that Maryland has jurisdiction to entertain actions arising out of solitary acts within the state satisfies due process." This note is also interesting in its reference to the development of the law with regard to the amenability of a foreign corporation to a local suit for "doing business" as signifying an implied consent to suit or as manifesting "corporate presence" and in its reference to the somewhat fictional character of the non-resident motorist being deemed to have appointed a local official as his agent for service of process. The note then goes on to say: "But the fictional emphasis appears to have ended in favor of a rule more in accord with the basic due process concept * * *," citing the *International Shoe Co.* case.

The complete disappearance of fictional consent in the non-resident motorist cases is shown by the opinion of the Supreme Court delivered by Mr. Justice Frankfurter in *Olberding v. Illinois Central Railroad Co.*, 346 U. S. 338. There is no pretense of fictional consent in the instant case, and the course of the law, culminating in the *International*

* "Suppose, for example, a driver for a foreign trucking corporation negligently injures a pedestrian in Maryland and at the same time runs up a large bill with a Maryland garage."

Shoe Co. case and in the *Olberding* case makes it clear that no consent, actual or fictional, is needed to sustain jurisdiction. (The *Olberding* case turned on the absence of consent as showing that a non-resident motorist, though amenable to suit in a court of the state where the accident occurred, had not consented to be sued in a court of that state and hence had not waived the federal venue statute.)

In *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664, the Supreme Court of Vermont upheld a statute somewhat similar to Section 88(d) and sustained jurisdiction in a tort case brought by a resident of Vermont growing out of an isolated transaction. There was no finding, nor did the statute require, that the act giving rise to such a suit be of an inherently dangerous nature. The contrary seems to have been the fact, since the action was for negligently damaging the roof of the plaintiff's home.

See also *Gillioz v. Kincannon*, 213 Ark. 1010, 214 S. W. 2d 212, also a tort case. The nature of the act does not appear to have been considered important, and the police power was considered to warrant the statute. (As to the possible breadth of the police power, see *Sligh v. Kirkwood*, 237 U. S. 52, at 59. This raises a question which we do not think it necessary for us to attempt to answer in this case.)

We are aware of the American Law Institute's having declined to take a position on the question here present. We have no quarrel with the Institute for its prudent reluctance to rush in where we feel required to tread, but we do not see how its refusal to do so can support either side.

It is our opinion that on the facts of this case as we have set them forth above, the contacts of Astral with the State of Maryland were sufficient to sustain a suit against it in this State under the test of due process stated in *International Shoe Co. v. Washington*, 326 U. S. 310.

The final question is whether the conditions upon the transfer of the vessels imposed by the Maritime Administration went beyond the "conditions ** with respect to

the future use and disposition of any or all of these vessels" to which Astral assented under the agreement dated February 19, 1952. The conditions in issue are (1) that requiring conversion of the frigates to be made in an American shipyard, (2) that prohibiting any transfer of stock interest in Astral, and (3) that providing for liquidated damages of $25,000 in respect of each vessel for any breach of conditions and the related requirement for a surety bond or other security in the aggregate amount of $75,000 ($25,000 per vessel) to guarantee adherence to all of the conditions.

The matter of conditions upon the transfer which might be imposed by the United States was not mentioned in the first draft of the contract. Under that draft it was recognized that the approval of the United States would be required and Astral was to obtain it with the cooperation of Boston. This provision was reversed in the final agreement, because Boston had learned that the seller would have to obtain such consent. Boston also learned that conditions would, in all probability, be imposed; and during the conference of February 11th, after Boston had brought the matter up, Astral's counsel ascertained that if the Maritime Administration had authority over the transfer, some conditions would be imposed. The wish to avoid inviting or seeming to invite their imposition was the reason for splitting the contract into two agreements, and doubtless it was also the reason (though there is no testimony to that effect) for neither party making a direct inquiry on the subject. Instead, the parties wrote into the agreement a statement of the kinds of conditions which, if imposed, would not avoid the contract.

A study of the pertinent statutory provisions relating to approval by the Maritime Administration — Sections 835 and 839 of Title 46, U. S. C. A. — and of the Presidential Proclamation of a National Emergency, dated December 16, 1950, which brought these statutory provisions into operation throws no light on the kind of conditions which might have been expected. Section 835 required the approval of the Maritime Administration for the proposed

transfer and Section 839 authorized that body to grant its approval either "absolutely or upon such conditions as * [it] might prescribe." Section 13 of the application for such approval which Boston executed and Astral also signed did give warning that conditions might be imposed, but spoke only of restrictions against larger vessels trading with United States ports for some specified period after transfer to foreign registry, or other conditions for the benefit of the American merchant marine. It also stated that surety bond might be required to secure performance of "such conditions" — presumably meaning those mentioned.

While thus in the dark as to what the conditions might turn out to be the parties made an agreement which involved some risk and some protection to each side. Astral took the risk of whatever conditions with respect to the future use and disposition of the vessels the Maritime Administration might impose, but it assumed no risk as to conditions not within that field. Boston, for its part, gained protection as to any conditions within the agreed field and took the risk of having the contract avoided if the conditions went outside that field.

Before proceeding to analyze any of the conditions actually imposed, we may observe that the contract, by its terms, is to be construed according to the law of Maryland. Neither the reasons which may have impelled the Maritime Administration to adopt the conditions which it prescribed nor any views entertained by any of its officials as to the proper interpretation of terms used in the contract between Astral and Boston can be considered as determinative of the law of this State with regard to the meaning of the contract. Certain views expressed in 1952 in a letter from the then General Counsel of the Maritime Administration have, in effect, been adopted in the argument of Boston. We deem it unnecessary to determine whether that letter was properly admitted in evidence, but do not wish to be understood by this reference to it as regarding it as properly admitted. Even if the words construed in

at letter had acquired a meaning as a matter of usage
the Maritime Administration, we hardly see how that
sage (if it existed) could affect the meaning of the con-
act between parties who knew nothing of it, or could be
nding upon them. *Mercantile Trust Co. v. Rode*, 137 Md.
2, 370, 112 A. 574. See also *Restatement of the Law of*
ontracts, Section 235 (a) and Comment (b) thereon.

With regard to the restriction against any transfer of
ock of Astral, without the prior consent of the Maritime
dministration, during the National Emergency pro-
aimed by the President on December 16, 1950, Boston
rgued, and the trial court after the hearing on the merits
eld, that this was a condition with respect to the use and
isposition of the vessels, because a corporation may dis-
ose of its assets in two ways — either by a sale of the
ssets or by a sale of the stock in the corporation. In adopt-
ng this reasoning the trial court seems to have overlooked
he fact that a sale of stock transferring control of corpo-
ate assets is made (except in very unusual cases) by one
r more stockholders who own the stock, and is not made
y the corporation.

The General Counsel of the Maritime Administration in
952 reached the same result by a somewhat different argu-
ent, which Boston also presses. He stated: "This condi-
on is attached because the holders of the stock of a cor-
oration not only directly affect the character of the corpo-
ate buyer but also are in a position directly to control the
uture use and disposition of the vessel for which permis-
ion to transfer foreign is given. Obviously, the stock con-
rol, whether by virtue of a majority ownership or by
irtue of a minority interest, is a factor directly affecting
he future use and disposition of the vessels."

Neither of these arguments is sufficient, in our view, to
vercome the simple fact that the contract binds Astral
o assent to conditions with respect to the future use and
isposition of the *vessels*, but says nothing at all about
ransfers of stock. If such transfers were intended to be
overed they could easily have been mentioned.

The contract is between Astral, a corporation, and Boston, a corporation, not between Astral and its stockholders, on the one side, and Boston on the other. A corporation cannot, of its own motion and without authority from its stockholders so to do, enter into a valid contract restricting the right of its stockholders to transfer their stock. At least, it cannot do so under the law of Maryland, and if the law of Panama is different on this point, there is no proof thereof before us. Astral made no such agreement in its dealings with Boston and gave no commitment to obtain such an agreement from its stockholders. Of course, it might have subjected itself to liability for the acts of others, but we do not find that it undertook to do so.

The difference between ownership of shares of stock in a corporation and ownership of a proportionate share of the assets of the corporation, requires no elaboration; nor does the difference between the sale by a corporation of assets which it owns and the sale by one or more stockholders of the shares in the corporation which they own. True, either a sale of corporate assets or the sale of a controlling interest in stock of the corporation owning the assets may accomplish the transfer of control over corporate assets, but that still does not make a transfer or disposition of shares of stock in a corporation owning a vessel a transfer or disposition of the vessel. In this connection, it may be noted in passing that the Maritime Administration's letter stating its consent and the conditions thereto speaks in a single paragraph of a "change in the ownership * * * of said vessels" and also of "any transfer of stock interest in said corporation [Astral]," which indicates to us that they were regarded as two different things.

Boston's argument that any change in stock ownership may lead to a change in policy and hence to a change in the use or disposition of vessels owned by Astral has almost no apparent logical stopping point. Anything which affects Astral may affect the use for which it may think it desirable to employ its ships, and hence virtually any condition could be supported by the same logic upon which Boston's

contention as to a change in stock ownership rests. For example, borrowing money might lead to a creditor's insisting upon some change in Astral's use of its vessels. Conditions relating to influences upon uses, but not to actual uses themselves, are not, in our judgment, within the meaning of the clause of the contract now before us. New stockholder control or creditor control of Astral could not authorize Astral to depart from any conditions prescribed by the Maritime Administration and agreed to by Astral as to the uses for which Astral's vessel might be employed or with regard to the sale or charter of the vessels. We take the phrase "conditions with respect to the future use and disposition of any or all of these vessels" to mean conditions with regard to their use or disposition by Astral or by any other owner or transferee acquiring them directly or remotely from Astral, and not as meaning any conditions which might possibly affect the use to which Astral or a future owner or transferee might wish to put them, regardless of whether or not such use was prohibited by any condition imposed by the Maritime Administration.

Since Astral was already engaged in business, the vessels would certainly not have constituted its sole assets, and a restriction against the transfer of any shares of its stock might deprive the two existing stockholders of freedom to realize upon assets having a value quite apart from any attributable to its ownership of these vessels.

It may be noted that Astral made no objection (nor do we think it could have done so successfully) to conditions which prohibited the use of the vessels in operations prohibited to American flag vessels under certain Department of Commerce orders or to conditions requiring the sale or charter of the vessels to the United States on the same terms as American-owned vessels. These conditions pertained directly to the use and disposition of the vessels by the owner thereof, and were within the type of conditions to which Astral did assent under its contract with Boston.

The court will not, under the guise of construction, rewrite the contract which the parties have made. *Joffe v. Niagara Fire Insurance Company,* 116 Md. 165, 81 A. 286; *Cowan v. Meyer,* 125 Md. 450, 94 A. 18. Nor will the court reform the contract in the absence of proof of mutual mistake and of precisely what was the real agreement. *England v. Gardiner,* 154 Md. 510, 142 A. 625. Further citation of authority on these established rules would be only cumulative.

It is unnecessary to prolong this opinion further by discussing extensively whether or not other conditions objected to by Astral are conditions with respect to the future use and disposition of the vessels. We may observe, however, that we do not regard the term "use" as including "conversion," since the conversion of a vessel, in our estimation, is a preparation for use, but is not a use in itself. There is also at least a serious question as to whether or not the place of conversion bears such a relation to future use as to bring it within the scope of conditions with respect to future use. On the other hand, Astral's position on this matter does not appear to have been entirely consistent in view of the application filed with the State Department. There are also serious questions as to whether the liquidated damages provision is within the conditions assented to, and also the bond or other security provisions. Insofar as these provide a reasonable method of making effective conditions which are within the scope of the conditions to which Astral assented, they would, we think, fall within the agreed conditions; and it may be noted that Section 13 of the application to the Maritime Administration gave notice that a surety bond to guarantee performance of at least some conditions might be required. Insofar, however, as these provisions pertain to conditions outside the agreed field, they must also fall outside of it.

Since at least one of the primary conditions imposed by the Maritime Administration and the appurtenant provisions with regard to liquidated damages and security went beyond the conditions to which Astral assented,

Astral was discharged from any obligation to purchase the vessels, and the judgment for the plaintiff must be reversed and judgment must be entered for the appellant.

Judgment Reversed, Without A New Trial, and Judgment for the Appellant, With Costs.

The Dissenting Opinion, of the Court of Appeals of Maryland by Henderson, J., and Hammond, J., is as follows:

Henderson, J., dissenting in part:

Judge Hammond and I agree with the majority of the Court that the trial court obtained jurisdiction of the subject matter and the person of the defendant, and that there is no valid constitutional objection to the action upon a contract made in this state. We do not agree, however, that the defendant was relieved of its obligation to complete the purchase because of the condition imposed by the Maritime Administration that there should be no change in the ownership or registry of the vessels or "transfer of stock interest in * * * [Astral], to persons not citizens of the United States, without the prior approval of the Maritime Administration."

It may be noted that the original contract merely stipulated that the escrow fund was to be paid over on delivery of proper bills of sale covering the vessels "after Government permission for the transfer has been obtained." Paragraph 2 of the supplemental agreement provided that approval of the transfer by the Maritime Administration "subject to conditions prescribed * * * with respect to future use and disposition of any or all of these vessels" would amount to approval of the United States Government. The Maritime Administration did approve the transfer. If we assume that the clause describing the general nature of the conditions that might be prescribed was a

condition precedent, and in legal effect a stipulation that any condition of a kind not covered by the quoted clause, if prescribed, would avoid the contract, we think it involves no distortion of language to hold that "with respect to future * * * disposition of" the vessels, would include at least a transfer to aliens of a controlling interest in the corporation that, in substance if not in form, would effect a change in ownership of the vessels. In any event, we think the phrase is not so clear and unambiguous as to forbid resort to the surrounding circumstances as an aid to interpretation.

It seems clear from the record that both parties knew, or should have known, that such a condition was customarily imposed by the Maritime Administration, in connection with transfers of domestic vessels generally, and war vessels in particular. Indeed, in the case of vessels owned by domestic corporations, the federal statute requires approval by the Maritime Administration of transfers of stock in such corporate owners to aliens. Title 46, Section 835, U. S. C. See also Sections 802 and 808, construed in *Meacham Corp. v. U. S.*, 207 F. (2) 535, 543, (C. A. 4th) (Soper, J.). Moreover, the application form of the Maritime Administration, executed by Astral, referred to these sections and called upon Astral to give the names, addresses, nationality and percentage of stock owned by its stockholders. In the light of these circumstances, it strains credulity to suppose that Astral intended the phrase to comprehend a condition on use as banana carriers that might frustrate the whole purpose of the sale, but not to comprehend the customary limitation upon future transfers of stock that was properly within the scope of the regulatory powers of the Maritime Administration. In this connection, it may be noted that the real motive that led Astral to a repudiation of the sale was the simple fact that the cost of converting the vessels into banana carriers was greatly in excess of what it had estimated. This, of course, was an error of business judgment that would afford no legal ground for relief. We cannot escape the conclusion

that the objection to the restriction as to future stock transfers was a mere pretext, not going to the essence of the bargain, and that the condition was well within the contemplation of the parties in the use of the words "with respect to * * * disposition". We think the judgment of the trial court should be affirmed.

MEMORANDUM OPINION

MOSER, J.:

In 1946 The Boston Metals Company acquired three frigates from the United States Navy. They had been built in Canada during World War II as warships. They were fast, narrow, had very little cargo capacity, and consumed large amounts of fuel. Their possibilities for use in commercial trade were, therefore, restricted. The plaintiff, however, determined to gamble on the possibility of selling them as going vessels and not to scrap them. As long as the scrap market held steady, there was not too much risk and, if they could be sold as going vessels, the plaintiff stood to make a large profit.

These ships were advertised by the plaintiff in the Journal of Commerce, which is the trade journal of ship agents, brokers, sellers and purchasers. This occurred in September and October, 1947. Through this means the fact the ships were for sale became known among the brokers, and inquiries began to come to the plaintiff. However, from 1946 until January, 1952, no firm offer for the purchase of these ships was received by the plaintiff.

Compania de Astral, the defendant, a Panamanian Corporation, is engaged in the fruit shipping business and, apparently upon recommendation of its own naval architect, concluded to purchase frigate class ships for conversion to banana carriers. It had plans and specifications drawn for this purpose, and in January, 1952, sought out W. R. Blackburn, a ship broker, requesting him to find

three frigates that Astral might purchase. Through Mr. Blackburn representatives of the plaintiff and defendant came together and, after negotiations in February, 1952, the basic terms of the sale were worked out and agreed upon. Both sides were represented by counsel.

The purchase price for the three vessels was $400,000.00. The contracts provided, among other things, that "permission for change of flag of these frigates to Panama shall be obtained by the Vendor with the co-operation of the purchaser"; that the purchase price was to be paid "on delivery * * * after Government permission for the transfer has been obtained"; and that "if either or both the Maritime Administration or the United States Navy has jurisdiction over this transfer, and approves such transfer subject to conditions prescribed by them or either of them with respect to future use and disposition of any or all of these vessels, such approval will amount to approval of the United States Government as provided for in the contract * * *."

Prior to the signing of the contract both sides were aware that, if the approval of the Maritime Administration was needed to effect the transfer of these vessels, there might be certain conditions attached to such transfer. Neither side was aware of, nor did either side take the trouble to find out prior to the signing of the contract, what those conditions might be.

Immediately after the contract had been agreed upon, Government approval of the transfer was sought. Mr. Blackburn, who had a State Department exporter's license, which neither plaintiff nor defendant possessed, offered to help obtain the necessary approval from the State Department to export these ships. The defendant's foreign representatives gave the broker the information necessary for the purpose of having him fill out the State Department forms. These were filed February 13, 1953, after counsel for defendant had first been notified. Among other things, on those forms the following representations appeared:

"9. State specific purpose for which the material is required and name and address of the ultimate consumer in foreign country: to be converted to refrigerated banana carrier in the United States or Canada for the purchaser who is the ultimate consignee.

* * * * * *

"14. Sold for conversion to refrigerated banana carrier before leaving the United States or Canada depending on where lowest price received for conversion. All armament removed. Conversion cost has been estimated at approximately $300,000.00."

Application for approval of transfer was also immediately made to the Maritime Administration by the plaintiff. While these forms were being processed, the defendant had the ships dry-docked in Baltimore and inspected. Although the contract provided that the defendant could reject one or more of the frigates if the condition of such was unsatisfactory to the defendant, they all were accepted, as indicated by the defendant's letter of March 21, 1952. The day prior to the sending of this letter the State Department licensed the export of these vessels.

After first having obtained Navy approval, the Maritime Administration approved the transfer, and on April 11, 1952, sent a letter to counsel for plaintiff informing him of such approval and of the conditions attached thereto.

The pertinent portions of this letter are as follows:

"* * * this is to advise that under date of April 9, 1952, the Deputy Maritime Administrator approved the referred to applications upon the condition that the vendee shall agree in form satisfactory to the General Counsel, that for and on behalf of itself, its successors and assigns:

(1) Said vessels shall be converted in a United States shipyard;

(2) For the duration of the National Emergency as proclaimed by the President on December 16, 1950:

(a) there shall be no change in the ownership or registry of said vessels nor shall there be any transfer of stock interest in said corporation to persons not citizens of the United States without the prior approval of the Maritime Administration;

(b) said vessels, whether owned by said foreign buyer, or any subsequent transferees, shall, if requested by the United States or any qualified department or agency thereof, be sold or chartered to the United States on the same terms and conditions upon which a vessel owned by a citizen of the United States could be requisitioned for purchase or charter as provided in Section 902, Merchant Marine Act of 1936, as amended, unless said vessels are lost or scrapped;

(c) said vessels shall not engage in operations prohibited to United States flag vessels under Department of Commerce Transportation Orders T-1 or T-2, or of any modification thereof so long as they remain in force; and

(3) In the event of any default under paragraphs (1) and/or (2) and/or (2a) and/or (2b) and/or (2c) above, the vendee shall pay to the Maritime Administration, Department of Commerce, as liquidated damages and not as a penalty, the sum of $25,000.00 lawful money of the United States of America, for each vessel involved in said default, said payment to be secured by a surety bond or other surety or form of guarantee satisfactory to the General Counsel of the Maritime Administration.

If the above conditions are acceptable to your clients so advise in order that appropriate Agreement and Bond may be prepared."

On April 16, 1952, representative of the defendant came to Baltimore and stated that the defendant objected to two of the conditions which the Maritime Administration had imposed on the transfer, namely, (1) that there should be no transfer of stock in Astral to persons not citizens of the United States without prior approval of the Maritime Administration, and (2) that the vessels must be converted in United States shipyards. He further stated that another representative of the defendant had just returned from Scandinavia and had found conversion there was cheaper than in the United States, and further that this representative had also found a better ship there. He wanted to know how much the plaintiff wanted to let the defendant out of the contract. The plaintiff refused to name a figure. Upon inquiry whether the conditions objected to could be eliminated or modified, the plaintiff, although standing on the contract, said it would as an accommodation ascertain whether the conditions could be altered. After plaintiff's counsel had conferred with the Maritime officials on the matter, they were informed no changes in the conditions would be made. On April 18, 1952, a formal letter setting forth this fact and denying the request for change in conditions was sent by the general counsel for the Maritime Administration to a representative of the plaintiff. This letter, in part, is as follows:

"You questioned the necessity and the reasons for condition (1) that the vessels shall be converted in a United States shipyard, and condition 2 (a) that there shall be no transfer of stock interest in the purchasing Panamanian corporation to persons not citizens of the United States without the prior approval of the Maritime Administration.

"The first of these conditions is always included as a matter of policy in connection with transfers foreign

of vessels which must be converted or upon which substantial repair work must be done. It is a condition which has, after careful consideration, been determined to be in the national interest concerning the use and the disposition of any vessels sold to foreign interests. As far as I am aware, it has not been waived by the Maritime Administration and, in my opinion, would not be waived except for some reason of overriding importance directly affecting the national security during the National Emergency.

"With respect to the second condition referred to above, this likewise is a standard provision which has always been applied as a condition to approvals for transfers foreign given by the Maritime Administrator for vessels of this size. This condition is attached because the holders of the stock of a corporation not only directly affect the character of the corporate buyer but also are in a position directly to control the future use and disposition of the vessel for which permission to transfer foreign is given. Obviously, the stock control, whether by virtue of majority ownership or by virtue of a minority interest, is a factor directly affecting the future use and disposition of the vessels. Although approval of such transfers of stock is normally given as a matter of routine, it is considered essential in the national interest that this power of approval be retained to assure that the future use and disposition of the vessels shall not be in conflict with the national interests of the United States."

On April 21 defendant's counsel was notified by letter of the Maritime Administration's decision. In this letter of notification to the defendant, the plaintiff's counsel paraphrased the Maritime Administration's letter of April 18, 1952, as follows:

"Our purpose was to obtain for Mr. Pettersen a clarification of condition 2 (a) in their letter approving the transfer of the frigates. You will remember that

this provided that there shall be no transfer of stock interest in the purchasing Panamanian corporation to persons not citizens of the United States without the prior approval of the Maritime Administration.

"We have been advised by the Maritime Administration that this is a standard provision which has always been applied as a condition to approvals for foreign transfers of vessels of this size. They take the position that, obviously, holders of the stock of a corporation not only directly affect the character of the corporate buyer but also are in a position directly to control the future use and disposition of the vessels. They advise us that approval of such transfers of stock is normally given as a matter of routine, but the Maritime Administration considers it essential in the national interest that this power of approval be retained to assure that the future use of the vessels shall not be in conflict with the national interest of this country. In the light of this, they are unwilling to modify this particular condition in any respect.

"We also discussed the necessity of converting these vessels in a United States shipyard. This provision has always been included as a matter of policy by the Maritime Administration in connection with foreign transfers of vessels which must be converted or upon which substantial repair work must be done. The Maritime Administration states that it has never been waived and would only be waived for some reason of overriding importance directly affecting the national security during the National Emergency."

Demands were then made by plaintiff upon defendant to perform the contract. Nothing further was heard from the defendant until by its letter of May 9, 1952, it formally repudiated the contract. The plaintiff again sought to sell the ships. There were a number of oral and written inquiries which were followed up by plaintiff by letter, telegram and telephone. In the summer of 1953, fearing that a break in the scrap market price was imminent, plaintiff

decided to sell these frigates to the highest bidder at public auction.

The auction was advertised in the Journal of Commerce and in the Baltimore Sun during July and early August, 1953. The defendant also was notified by letter of the date and place of auction. On August 11, 1953, the auction sale took place, and plaintiff bought all three ships in at $40,000.00 apiece, topping the bids of the Bethlehem Steel Company and K. Hettlemen, who bid $35,000.00 per ship. This sale took place at a time when the scrap metal market was at the highest point it had reached in twenty months, the market being considerably higher than in April, 1952, when the breach of the contract had occurred. It is interesting to note one week after the auction the scrap market began to fall, and by the end of September had fallen to its lowest level in twenty months.

The defendant relies for its defense on two points:

1. That the following conditions imposed by the Maritime Administration on the transfer of these vessels were not conditions "with respect to future use and disposition of (said) vessels", as provided in the contracts dated February 18 and 19, 1952:

a. Said vessels be converted in a United States shipyard;

b. There should be no transfer of stock interest in the corporation owning said vessels to persons not citizens of the United States, without the prior approval of the Maritime Administration;

c. The vendees pay the Maritime Administration, Department of Commerce, as liquidated damages, and not as a penalty, the sum of $25,000.00 in the event of any failure to perform certain conditions, and that such payment be secured by a surety bond or other surety or form of guarantee satisfactory to the General Counsel of the Maritime Administration.

2. That if there were any breach of contract, plaintiff did not suffer any damage and/or failed to take proper steps to minimize its damages.

Miss Ruth Holmes, chief of the division in charge of transfers foreign for the Maritime Administration, testified without contradiction that the condition that ships be converted in United States yards was the usual and ordinary requirement, and that it was invariably imposed in the case of vessels exceeding 1000 gross tons.

The defendant on two separate occasions sent out formal invitations to bid on the conversion of these vessels. Canadian and American shipyards were included in the first invitation, while only three American shipyards were asked for bids in the second. Apparently, the lowest bid on both the first and second invitations was from the Bethlehem Shipyard.

The Court must interpret, according to legal standards, what is meant by "future use and disposition" and, for the purpose of determining this, the standard of interpretation is the standard of limited usage, that is, the ordinary meaning of the writing to parties of the kind who contracted, together with such circumstances as surround the making of the contract.

Webster's New International Dictionary of the English Language states:

> " 'use' means 'act of employing anything, or state of being employed; application; employment'."

The New Century Dictionary defines use as follows:

> "To employ for some purpose; put into service, or make use of * * *; apply to one's own purpose."

The word "use" is one of the most comprehensive words in our language, and has been used in many senses. It is certainly not confined to "ultimate utilization". *Queensboro Farm Products v. Wickard*, 47 F. Supp. 206, 211. In short, "the exercise of any right of ownership over property

is the use of it." *State v. Crane Hodes Oil Storage Co.*, 2 Terry Del. 194, 201, 18 A. 2d 427, 429. "Use means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property * * *." *Stanolind Pipe Line Co. v. Oklahoma Tax Commission*, 30 F. Supp. 131, 133. A chattel does not have to be in actual operation to be in use. *Red Ball Motor Freight v. Employers Mutual Liability Ins. Co.*, 189 F. 2d 374; *American Auto. Ins. Co. v. Taylor*, 52 F. Supp. 601.

As for "disposition", as "applied to property, the term has been variously defined as meaning alienation or bestowal, barter, exchange, removal or sale; also definite settlement with regard to some matter; disposal, plan or arrangement for the disposal, distribution, or alienation of something; the state or manner of arrangement or disposal; distribution, final settlement, order, or ultimate destination." 27 C. J. S. pp. 349-350.

The Court is of the opinion that the conditions imposed by the Maritime Administration on the transfer of these frigates, which conditions the defendant complains of, relate to future use and disposition within the commonly accepted meaning of those words.

A. Conversion in United States shipyards is a condition with respect to the future use and disposition of the vessels:

Not only in the conversion of the vessels is there a use of them in its commonly accepted meaning, but the very term "conversion" itself is to put the ships into service, to make use of them, and to apply them to the defendant's own purpose. It is quite apparent to the Court there can be no question but that the requirement that these ex-naval vessels be converted to fruit carriers in the United States is a condition with respect to the future use of the vessels. The Maritime Administration was making certain that when these ships came into the hands of a foreign power they would be used as fruit carriers and not as warships. That agency sought to control the ultimate use of the ships by requiring their demilitarization by conversion before

they left the United States. In addition thereto, prior to the signing of the contracts, the defendant was aware, because of the information requested by the State Department, that the place of conversion was a material factor to be considered by the Government in granting or denying the approval of the transfer.

B. The condition that there should be no transfer of stock interest in the corporation owning said vessels to persons not citizens of the United States, without the prior approval of the Maritime Administration, relates also to the future use and disposition of the vessels:

There could be no more definite disposition of these vessels than a sale of them. Corporations dispose of assets in two ways, either by a sale of the assets or by a sale of the stock in the corporation. In practical effect there is no difference. The Maritime Administration was endeavoring not to leave open the possibility that these vessels might be transferred to a hostile or foreign power by a transfer of the stock ownership of a corporation. This condition on the future disposition of the stock of the purchasing corporation is clearly a condition with respect to the future use and disposition of the vessels themselves.

C. The condition that in the event of default the vendees pay the Maritime Administration as liquidated damages, and not as a penalty, the sum of $25,000.00, to be secured by a surety bond or other surety or form of guarantee satisfactory to the General Counsel of the Maritime Administration, is also a condition with respect to future use and disposition of the vessels:

The defendant never attempted to ascertain what form of security or guarantee would be satisfactory to the General Counsel of the Maritime Administration. It is quite possible that that official might have been satisfied with the personal guarantees of the company itself. It cannot be assumed that the bond would have cost the defendant money unless it breached its promise to live up to the conditions imposed. This provision for a bond merely put

teeth into the other conditions, and was one way of making sure that these conditions would be carried out once the ships were in other waters and under another flag. It was unquestionably a condition with respect to future use and disposition to require the defendant to post a performance bond or give some other satisfactory guarantee that it would use and dispose of these vessels as required by the Maritime Administration.

In addition to the above, the Court finds that the plaintiff and defendant, and plaintiff's and defendant's representatives were shrewd business men, representing large interests, and with considerable experience. Both were aware there was a national emergency. Both plaintiff and defendant were aware that in the interest of national safety the United States Government, through one of its maritime agencies, would impose conditions upon the transfer of these vessels to a foreign flag and out of the jurisdiction of the United States Government. Yet, the defendant, with counsel in New York and representatives in New York, after agreeing upon the terms setting forth the contract was subject to the approval of agencies of the United States Government, failed to inquire, prior to the signing of this contract, what those conditions might be. In addition thereto, the conditions actually imposed on the transfer were neither unusual nor onerous, but were the same conditions imposed on the transfer of every government naval vessel of over 1000 gross tons during the period of the national emergency.

The issue of damages was not as seriously contested by the defendant as was the breach of the contract. In this case the seller sustained damages in the amount of the difference between the contract price and the amount at which the ships were sold at auction, plus incidental expenses, or a total of $282,112.45, less the sum of $7,711.00 paid by the defendant, representing the expense of towing, shifting and two days' drydocking of such vessels which, under paragraph 8 of the contract, was to be borne by plaintiff, making a balance of $274,401.45.

The Court finds there was no market for these vessels as going ships from after the breach of the contract, and that the plaintiff made full and reasonable efforts to minimize damages by attempting to sell these ships as going vessels. The Court further finds that the only fair market for these vessels was the scrap market price, and that at the time of the auction the top dollar in the scrap market was paid for these ships. There was no serious effort made by the defense to challenge the fairness of the auction sale.

The judgment of the Court, therefore, is in favor of the plaintiff in the amount above stated, $274,401.45.

HERMAN M. MOSER,

Judge.

November 20th, 1953.

JAN 27 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 515

THE BOSTON METALS COMPANY,
Petitioner,

vs.

COMPANIA DE ASTRAL, S. A.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM A. GRIMES,
Counsel for the Respondent,
640 Mathieson Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

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The respondent accepts the petitioner's reference to the opinions below, and, except as subsequently noted, its statement of facts, but the respondent does not agree that the jurisdiction of this Court is properly invoked or that the question presented is as stated, or that the case involves any Federal statutes.

JURISDICTION

This action was brought to recover for an alleged breach of a contract made in Maryland and containing a provision that in case of its enforcement or dispute as to interpretation or construction the substantive laws of Maryland shall apply (R. 9). The suit of the petitioner (the plaintiff below) does not depend on the validity of a treaty or statute

of the United States, and, prior to the filing of the petition herein, no title, right, privilege or immunity was ever specially set up or claimed by the petitioner under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. Accordingly the jurisdiction of this Court may not be invoked under 28 USC §1257(3) as asserted by the petitioner.

QUESTION PRESENTED

The sole question presented is the correctness of the decision of the Maryland Court of Appeals, construing a Maryland contract and holding as a matter of Maryland law that the respondent was discharged from any obligation to perform its agreement to purchase certain vessels from the petitioner. Since the contract was never performed, there was no transfer of the vessels and there is no question of thwarting or interfering in any way with any control of transferred vessels by the Maritime Administration as claimed by the petitioner.

THE STATUTES INVOLVED

The petitioner's declaration (R. 5-10) and amended declaration (R. 32-33) set forth a cause of action based solely on the alleged breach of a Maryland contract and do not refer to nor depend upon the statutes cited in the petition. The respondent asserts that the statutes in question have no material bearing on the decision of the case at bar.

STATEMENT OF THE CASE

The respondent believes that the following additions to or corrections of the petitioner's statement are necessary:

1. The Maritime Administration approved the proposed transfer of the vessels by the petitioner to the respondent

subject to other conditions than those mentioned by the petitioner. Among such other conditions was the condition that

> "(1) Said vessels shall be converted in a United States shipyard" (R. 142).

The respondent promptly objected to that condition, as well as to the stock transfer condition, on the ground that it had not agreed to accept the vessels subject to such conditions. The Maryland Court of Appeals found it unnecessary to decide whether the imposition of the conversion condition also excused the respondent from the performance of the contract, but intimated that the term "use" did not include "conversion" so as to make that condition one "with respect to the future use and disposition of * * * these vessels" and hence within the type of conditions to which the respondent had agreed (R. 220; Appendix B to petition, page 46).

2. It is not accurate to say, as is claimed on pages 4 and 5 of the petition, that the Maryland Court of Appeals held that a corporation *could not agree* to the condition pertaining to the transfer of stock except with the concurrence of its stockholders. The Court of course remarked that a corporation could not so bind its shareholders without their consent, but the basis of its decision was that the respondent *had not in fact made* any agreement at all concerning stock transfers. The Court said:

> "Astral made no such agreement in its dealings with Boston and gave no commitment to obtain such an agreement from its stockholders. Of course, it might have subjected itself to liability for the acts of others, but we do not find that it undertook to do so" (R. 217; Appendix B to petition, page 44).

3. Petitioner states that the alleged Federal question — whether a State Court can interfere with and limit the policy, practice and power of a Federal agency — was inherent in the case from the beginning. The respondent asserts on the contrary that no such question exists in this case and that it was never raised in the trial court or the Court of Appeals. Such a question was first suggested in the petition. It is significant that the petitioner has completely failed to comply with item (f) of paragraph 1 of Rule 23. The petition contains no statement whatsoever of the *manner* in which the alleged Federal question was raised, no statement whatsoever of the *method* of raising it and no reference to the record to show that it was timely and properly raised, or raised at all until the motion for rehearing. An examination of that motion (R. 226-241) discloses that even there the petitioner was urging error in the construction of the contract and not, as here, any infringement on the powers or practices of the Maritime Administration.

ARGUMENT

I.

THERE WAS NO INTERFERENCE WITH THE POWERS OR PRACTICES OF THE MARITIME ADMINISTRATION.

The petitioner's contention that the decision of the Court of Appeals thwarted the practice and purpose of the Maritime Administration in exercising control over the future use and disposition of vessels transferred to foreign ownership is without foundation either in the record or in fact. The statement on page 4 of the petition that the conditions imposed by the Maritime Administration were found by the trial court to be "within the power of the Maritime Administration to impose" implies that there had been some question raised on that point. Nothing could be farther

from the fact. At no time did the respondent ever challenge the right of the Maritime Administration to impose the conditions. The objection made by the respondent to the conditions imposed was not that the Maritime Commission was lacking in authority, but that the respondent had never agreed with the petitioner to accept conditions of that type. Thus the only issue was what constituted the agreement between the parties, and the powers and practices of the Maritime Administration were never in controversy. Similarly there was no decision by the Court of Appeals that the Maritime Administration was without power to impose the conditions in question, but only a holding that the respondent had never agreed to such conditions. See the statement by the Court on this point, *supra*, page 3.

To suggest, as the petitioner does, that the Court of Appeals of Maryland has in some way restricted the power of the Maritime Administration to control the future use and disposition of vessels transferred to a foreign flag is to imagine what simply does not exist. The Court's opinion contains no intimation, and still less any holding, that there was anything improper or unauthorized about the conditions imposed by the Maritime Administration. The sole basis of the decision is that the purchaser had not agreed to accept the vessels subject to such conditions and therefore was discharged from any obligation to perform the contract.

II.

THE SOLE QUESTION IS THE PROPER CONSTRUCTION OF A MARYLAND CONTRACT.

The contract between the parties provided:

> "11. In case of enforcement of this contract, or dispute as to interpretation or construction of this contract, the substantive laws of the State of Maryland, United States of America, shall apply" (R. 9).

That the decision of the Court of Appeals is based on a construction of the contract in accordance with the laws of Maryland is made clear by the Court's language. At an early stage of its consideration of the case on the merits the Court said:

> "Before proceeding to analyze any of the conditions actually imposed, we may observe that the contract, by its terms, is to be construed according to the law of Maryland. Neither the reasons which may have impelled the Maritime Administration to adopt the conditions which it prescribed nor any views entertained by any of its officials as to the proper interpretation of terms used in the contract between Astral and Boston can be considered as determinative of the law of this State with regard to the meaning of the contract. Certain views expressed in 1952 in a letter from the then General Counsel of the Maritime Administration have, in effect, been adopted in the argument of Boston. We deem it unnecessary to determine whether that letter was properly admitted in evidence, but do not wish to be understood by this reference to it as regarding it as properly admitted. Even if the words construed in that letter had acquired a meaning as a matter of usage by the Maritime Administration, we hardly see how that usage (if it existed) could affect the meaning of the contract between parties who knew nothing of it or could be binding upon them. *Mercantile Trust Co. v. Rode*, 137 Md. 362, 370, 112 A. 574. See also *Restatement of the Law of Contracts*, Section 235(a) and Comment (b) thereon" (R. 215, Appendix B to petition, pages 42-43).

The dissenting opinion (R. 222-225; Appendix B to petition, pages 47-49) also treats the question on the merits as one of construction of a contract and not as involving any powers or practices of the Maritime Administration.

The proper construction of most contracts, and certainly the one here involved, is a matter of local law with which this Court is not concerned. *Kryger v. Wilson*, 242 U. S. 171 at 176.

III.

THERE IS NO FEDERAL QUESTION.

From the respondent's statement with respect to jurisdiction, *supra*, pages 1-2, and from what has just been said as to the real nature of the case and of the decision of the Maryland Court of Appeals, it is apparent that there never was and is not now any Federal question presented by this case.

If the transfer of the vessels had been completed as contemplated by the agreement of the parties, it is conceivable that some Federal question might thereafter have arisen as to the powers, practices and purposes of the Maritime Administration in imposing conditions upon the transfer. But where, as here, there has been no transfer, and on the contrary a repudiation by the prospective purchaser of any obligation to perform, with an ensuing action for breach of contract, it is crystal clear both that there has been no interference with the powers of the Maritime Administration over transferred vessels and that the only question presented is one of construction of the contract to determine the respective rights and liabilities of the parties. The petitioner's claim that a Federal question arises under those circumstances is manifestly an attempt to confer an additional and novel power upon the Maritime Administration, enabling it to usurp the function of the State Court to construe the agreement, and to change all prior conceptions of Federal jurisdiction.

In addition, the petitioner's failure to point out the alleged Federal question as required by paragraph 1(f) of Rule 23 of this Court should alone be a sufficient reason for denying the petition.

CONCLUSION

Since there was no interference with the powers or practices of the Maritime Administration and the only question presented is not of a Federal nature, but solely of State law, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM A. GRIMES,

Counsel for the Respondent,
640 Mathieson Building,
Baltimore 2, Maryland.